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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MUTUAL TRADING CORPORATION, MOHAMMAD SHAFIQ, and JOHN HAUPER,

Petitioners,

v.

UNIROYAL GOODRICH TIRE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN A. DIENNER, III
Counsel of Record
SEDGWICK, DETERT, MORAN & ARNOLD
209 South LaSalle Street
7th Floor
Chicago, Illinois 60604
(312) 641-9050
Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED

A. Whether disputes arising between two corporations engaged in a long-term, legitimate business relationship, can constitute a "pattern of racketeering activity" in violation of Title 18 U.S.C. §1962.

B. Whether the award of $1.4 million in attorneys' fees to the plaintiff following its recovery of $156,000 in compensatory damages on its combined RICO and state tort claims is a penalty not warranted by Title 18 U.S.C. §1964(c).

C. Whether the plaintiff must elect between recovering treble damages awarded by the court pursuant to 18 U.S.C. §1964(c) and punitive damages awarded by the jury pursuant to common law.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Mutual Trading Corporation, Mohammad Shafiq and John P. Hauper respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on August 3, 1995.

OPINION BELOW

The opinion and judgment of the Seventh Circuit Court of Appeals dated August 3, 1995, is reported at 63 F.3d 516 (7th Cir. 1995). A copy of the opinion is reproduced in the Appendix at page 1A. The judgment of the United States Magistrate for the Northern District of Illinois Eastern Division is reproduced in the Appendix at page 1B.

JURISDICTIONAL STATEMENT

On August 3, 1995, the United States Court of Appeals for the Seventh Circuit entered its judgment and opinion affirming the action of the United States Magistrate Judge for the Northern District of Illinois Eastern Division who tried the case by stipulation of the parties. The petitioners filed a timely request for rehearing which request was denied on September 7, 1995 (Appendix at page 20A).

The jurisdiction of the Court to review the judgment of the United States Court of Appeals for the Seventh Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title 18 United States Code Section 1961(5)

Title 18 United States Code Section 1962

Title 18 United States Code Section 1964(c)

These provisions are reproduced, verbatim, in the Appendix commencing at p. 1D.

STATEMENT OF THE CASE

In 1982, a representative of B.F.Goodrich Tire Company[1] approached Shafiq and encouraged him to export Goodrich tires to Saudi Arabia. Shafiq, through his wholly-owned company, Mutual Trading Corporation ("MTC"), quickly became Goodrich's largest Saudi distributor. As a result, Goodrich offered and MTC accepted the opportunity to export the "Detroiter" tire (a first quality, "private label" tire not identified as being manufactured by Goodrich).

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[1] In 1986, B.F.Goodrich Tire Company and Uniroyal Tire Company merged and became the Uniroyal/Goodrich Tire Company.

The benefit of the Detroiter was that MTC would have no competition with other tire distributors in the Saudi marketplace as MTC would be the *exclusive* Detroiter distributor. MTC also continued to sell Goodrich brand name tires in Saudi Arabia in competition with two Saudi Goodrich Tire distributors. Their unhappiness with MTC's success and MTC's desire to have the Detroiter exclusivity agreement memorialized in writing, led the parties to enter into the "Jeddah Agreement."[2]

In late 1986 Shafiq learned of a major quality problem with Detroiter tires. Despite UGTC's assurances that all Detroiter tires were first quality, MTC continued to receive complaints from its customers about second-quality Detroiter tires. In February, 1987 Shafiq discovered U.S. government export reports which revealed that a third party had exported 20,000 second-quality Detroiter tires to Saudi Arabia. Some of these second-quality Detroiter tires were presented to MTC (the official distributor) on warranty claims. MTC requested compensation from UGTC for those warranty losses. MTC's customers refused to place new Detroiter orders until the warranty losses were resolved. UGTC made a series of proposals to adjust MTC's losses but each was substantially less desirable than its standard adjustment policy.

In July, 1988, UGTC finally agreed to compensate MTC but only for Detroiter tires manufactured at its Mexican

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[2] The Jeddah Agreement provided that Goodrich would produce as many Detroiter tires as MTC could sell, that MTC would concentrate its efforts on Detroiter sales and pay an additional 2% for all Goodrich brand name tires which premium would be split between the two Saudi distributors. In exchange for paying this premium, MTC was guaranteed an exclusive requirements contract for the Detroiter tire.

plant between the 13th and 52nd weeks of 1986. MTC was required to identify the tires by their DOT codes and complete a claim form.[3] At the same time, UGTC unilaterally announced that it would no longer produce the Detroiter tire despite the fact that MTC had faithfully paid its 2% premium for UGTC brand name tires pursuant to the Jeddah Agreement.[4] Shafiq complained that MTC's business would be destroyed by the withdrawal of the Detroiter tire. He pleaded with UGTC to continue the line, but to no avail.[5]

Following the appearance of second-quality Detroiter tires in the Saudi market, UGTC's denials that such had occurred, its three-year foot-dragging in compensating MTC for its losses, the elimination of the Detroiter tire, UGTC's implausible explanation for that act and the tire's re-appearance under the guise of a "Medalist" tire, caused

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[3] The U.S. Department of Transportation requires tire manufacturers to emboss certain information (plant location, date of manufacture, etc.) in code on its tires. MTC subsequently filed a claim for 4,896 defective Detroiter tires. The plaintiff partially credited MTC's account for the loss on December 12, 1988 and issued a final credit on November 30, 1989 (more than three years after the problem was first brought to the plaintiff's attention). MTC agreed to retain the defective tires for 90 days during which the plaintiff could inspect them to determine the causes of failure.

[4] It is MTC's belief that either its two Saudi competitors prevailed upon UGTC to squeeze MTC out of the Saudi market or UGTC decided to eliminate MTC. The Saudi market consumed a relatively constant number of tires. Additional suppliers did not create additional demand. As a result, MTC's less expensive Detroiter tires were eating into UGTC's premium brand tire sales.

[5] UGTC ultimately claimed that the tire molds had been left out in the rain and rusted. MTC offered to have the molds resurfaced but that offer was refused, without explanation. Thereafter, a UGTC tire bearing the name "Medalist" was exported by others to Saudi Arabia. The Medalist was *identical* to the Detroiter tire except for the name.

the business relationship between UGTC and MTC to be irretrievably damaged.

Shortly after making its final warranty payment to MTC for the second-quality Detroiter tires, UGTC filed the present lawsuit seeking payment for open accounts and $809,228 in compensatory damages for alleged RICO violations and a variety of purported "frauds" and torts relating to pricing disputes and bonus payments.[6] MTC filed counterclaims complaining of UGTC's breach of the requirements contract (Jeddah Agreement) and UGTC's tortious misconduct.

At the close of the trial, the court entered a directed verdict in the plaintiff's favor on the undisputed open account claims. Thereafter, the jury returned a verdict of $156,000 in compensatory damages in the plaintiff's favor on its *combined* RICO, common law fraud and tort claims. Thereafter, the trial court awarded the plaintiff $1.4 million in attorney's fees and $45,000 in costs.

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[6] The open-account claims (Counts VII and VIII) are claims for breach of contract. It is well accepted that such claims do not constitute a scheme to defraud for purposes of the mail fraud statute, *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (7th Cir. 1990), *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980). Consequently, they cannot be deemed predicate acts for RICO.

REASONS FOR GRANTING THE WRIT

A.

THE RULING BELOW THAT COMMERCIAL DISPUTES BETWEEN TWO CORPORATIONS ENGAGED IN A LONG-TERM, LEGITIMATE BUSINESS RELATIONSHIP CAN FORM THE BASIS OF A "PATTERN OF RACKETEERING ACTIVITY" IN VIOLATION OF TITLE 18 U.S.C. §1962 IS CONTRARY TO THE HOLDINGS OF *SEDIMA, S.P.R.L. v. IMREX CO.*, 473 U.S. 479 AND *H.J., INC. v. NORTHWESTERN BELL*, 492 U.S. 229.

This Court held in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1986) that a plaintiff must plead and prove that there is "continuity plus relationship" among the predicate offenses to establish a "pattern of racketeering activity" for purposes of RICO. It further held that isolated predicate acts coupled with the act of conducting an enterprise that affects interstate commerce does not constitute a violation of 18 U.S.C. §1962.

The Court furthered its analysis of "pattern of racketeering activity" in *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195, 208 (1988) by holding that the predicate acts must both be related *and* amount to, or pose a threat of continuing criminal activity,

> RICO's legislative history tells us . . . that the relatedness of racketeering activities is not alone enough to satisfy §1962's pattern element. To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.

Despite the concurring Justices' doubt that short term criminal conduct was intended by Congress to be excluded from the scope of RICO's coverage, the majority concluded that it was.

> Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with *long-term criminal conduct* (emphasis added).

Id., at p. 209.

> [W]hen Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten *long-term criminal activity* (emphasis added).

Id., at p. 210, ft.nt. 4.

The Court then provided examples of criminal conduct which would meet the long-term, "continuity" test. The first involved predicate acts which plainly implicate a threat of long-term, continued criminal activity (e.g. a hoodlum extorting monthly "insurance" payments from a shop owner to protect against window breakage). Each such act includes a specific threat extending indefinitely into the future. The second involved predicate acts which either represent the "regular way" of conducting the defendant's *criminal enterprise* or constitute the defendant's regular (but illegal) way of conducting a *legitimate business*, *id.* at p.210. The Court concluded that H.J. Inc.'s allegations that the defendant engaged in a *six-year* pattern of bribing state regulatory officials to receive approvals to charge higher telephone rates adequately pleaded a pattern of racketeering activity.

The facts at bar are not remotely analogous to either the examples of "continuity" provided in *H.J., Inc.* or by the facts of that case. To the contrary, this case reveals a long-term, legitimate business relationship followed by a vitriolic falling out. Much like a divorce, there were charges and countercharges at the time of the breakup. What was *altogether lacking*, however, was any proof of

"long-term criminal conduct" which is RICO's *threshold* requirement.

There was no proof that MTC was either engaged in criminal conduct which projected into the future or that it engaged in criminal conduct as its regular way of doing business with the respondents and its other business partners. It was uncontested that MTC and UGTC had a successful, five-year, on-going business relationship before the predicate acts alleged by UGTC. Moreover, there was no evidence that MTC engaged in "racketeering activity" with its other business partners.

UGTC's pleadings failed to allege and its evidence failed to establish that MTC was either an association existing for long-term criminal purposes or that it committed criminal acts as a regular way of conducting its legitimate business. Simply put, there was no evidence of "continuity." This case presents the archetypical misapplication of RICO. The Court of Appeals for the Seventh Circuit erred in sanctioning UGTC's use of RICO.

B.

THE DISTRICT COURT'S AWARD OF $1.4 MILLION IN ATTORNEYS' FEES TO THE PLAINTIFF FOLLOWING ITS RECOVERY OF $156,000 IN COMPENSATORY DAMAGES ON ITS COMBINED RICO AND STATE TORT CLAIMS CONSTITUTES A PENALTY NOT AUTHORIZED BY TITLE 18 U.S.C. §1964(c).

The plaintiff recovered $156,000 in compensatory damages on its *combined* RICO, common-law fraud and state tort claims.[7] UGTC sought and was awarded $1.4 *million*

[7] It is impossible to know how much the jury awarded to UGTC on its RICO claims due to the format of the special interrogatory

(Footnote continued on following page)

dollars in attorneys fees (for 8500 hours of time churned out by nineteen attorneys, eleven legal assistants and one summer associate) and $45,000 in costs. The petitioners assert that this award constitutes a penalty not contemplated by RICO.

Title 18 U.S.C. §1964(c) contemplates an award of costs and *reasonable* attorney's fees to a successful RICO plaintiff. This Court has held that the "initial estimate" of a reasonable fee is calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate, *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The court may adjust that product taking into account other factors, *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67, 94 (1989).

Even if the compensatory award were to stand, it was patently unreasonable of the plaintiff to have expended $1.4 million in attorneys' fees to recover less than $156,000 in RICO damages. If there is no requirement that the fees reasonably relate to the nature of the claim and the result obtained, litigants will continue to bludgeon their adversaries with fees as an additional penalty not contemplated by RICO.

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[7] *continued*

(see Appendix C). The petitioners will assume, *arguendo*, that the entire award was for RICO damages. That cannot be the actual case because UGTC was required to prove damages as an element of their fraud and tort causes of action. Hence, the District Court's trebling of the *entire* award pursuant to 18 U.S.C. §1964(c) was plain error.

C.

THE PLAINTIFF MUST ELECT BETWEEN RECOVERING TREBLE DAMAGES AWARDED BY THE COURT PURSUANT TO 18 U.S.C. §1964(c) AND PUNITIVE DAMAGES AWARDED BY THE JURY PURSUANT TO COMMON LAW.

The jury was *not* advised that its compensatory award would be trebled pursuant to 18 U.S.C. §1964(c). The jury awarded $320,000 in punitive damages in favor of UGTC and against the petitioners. Consequently, the plaintiff recovered *quintuple damages*. Such damages are neither contemplated by the RICO Act nor the state law authorizing punitive damages. Each law assumes that its measure of damage will make the plaintiff whole *and* punish the defendant. Neither contemplates successive awards for the *same injury*. UGTC's recovery of five fold its damages was plain error.

CONCLUSION

For the foregoing reasons, the defendants-appellants urge this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment and opinion.

Respectfully submitted,

JOHN A. DIENNER, III
Counsel of Record
SEDGWICK, DETERT, MORAN & ARNOLD
209 South LaSalle Street
7th Floor
Chicago, Illinois 60604
(312) 641-9050

Attorneys for Petitioners